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Conflict in the Skies: The Law of Air Defence Identification Zones

Christopher K. LAMONT^{*}

Air Defence Identification Zones (ADIZs), designated areas of non-territorial airspace where States impose reporting obligations on civil and military aircraft, constitute a highly contentious security practice, and in the absence of an international legal framework to regulate unilateral ADIZ declarations by States, find themselves increasingly contested with States advancing competing claims on the limits of their scope and reporting obligations. China's 23 November 2013 declaration of an East China Sea ADIZ highlights two important questions that arise from this contested security practice. The first question stems from conflicting positions on the extent to which States can impose reporting obligations on aircraft operating outside of territorial airspace, while the second question revolves around what, if any, impact the exercise of administrative control in airspace can have upon territorial claims advanced by States. In order to explore both of the above questions this article will provide an introduction to the practice and law of ADIZs before examining two distinct ADIZ regimes, those maintained by the United States and China. This article will observe that while international law does not prohibit States from declaring ADIZs in non-territorial airspace, it does prohibit States from restricting air navigation outside of territorial airspace and thus certain reporting requirements demanded on the part of States may extend beyond what is permissible under international law.

1 INTRODUCTION

On 23 November 2013, a contested security practice, which dates back to the early years of the Cold War,¹ emerged onto the world's headlines with China's declaration of an Air Defence Identification Zone (ADIZ) over the East China

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¹ The first Air Defence Identification Zones were declared by the United States in December 1950.

Sea.² China's promulgation of an ADIZ, or a designated area of airspace where reporting obligations are imposed upon aircraft, not only imposed reporting obligations on foreign aircraft in transit through airspace outside of China's territorial airspace,³ but also, constituted an attempt to strengthen Beijing's position in relation to territorial claims over two disputed territories, the Senkaku/Diaoyu Islands, which are claimed by Japan, China and Taiwan,⁴ and the Ieodo/Suyan reef, which is claimed by South Korea and China.⁵

Although China justified the East China Sea ADIZ as a security and regulatory necessity,⁶ the inclusion of disputed maritime territories within the ADIZ triggered immediate condemnation from neighbouring States, including Japan and South Korea, along with a swift challenge by the United States, which flew two US Air Force B52 strategic bombers through the contested ADIZ on 27 November 2013.⁷ Furthermore, within weeks of the US incursion into China's newly declared ADIZ, South Korea announced it would extend its ADIZ, for the first time since its creation over six decades ago, to include airspace claimed by China and Japan.⁸

² China establishes 'air-defence zone' over East China Sea, BBC NEWS, (23 Nov. 2013), available at <http://www.bbc.co.uk/news/world-asia-25062525> (last accessed 25 Apr. 2014).

³ Territorial waters extend to a maximum of 12 miles from the coastal baseline. China also claims an exclusive economic zone of 200 miles. China claims its ADIZ, declared on 23 Nov. 2013, extends 300 miles beyond China's territorial waters.

⁴ The Senkaku/Diaoyu Islands are a chain of eight small and uninhabited volcanic islands located in the East China Sea. Although these islands were claimed by Japan since 1895, they were administered by the United States from the end of the Second World War in 1945 until 1972, when the US returned the islands to Japan along with Okinawa and the Ryukyu Islands. They are currently claimed by China, Japan and Taiwan.

⁵ The Ieodo/Suyan reef is described as a 'submerged rock' south of South Korea's southern most Island, Marado. It falls within China and Korea's overlapping exclusive economic zones and is claimed by both States. For an overview, from a South Korean perspective, see Kim Young-jin, *Why Ieodo Matters: Reef vital to protecting Korea's economic zone*, Korea Times, (18 Sept. 2012), available at http://www.koreatimes.co.kr/www/news/nation/2012/09/117_120266.html (last accessed 2 May 2014).

⁶ China's ADIZ to improve identification: FM spokesman, Xinhua, (3 Dec. 2013), available at http://news.xinhuanet.com/english/china/2013-12/03/c_132938467.htm (last accessed 25 Apr. 2014).

⁷ It is of interest to note that prior to China's ADIZ declaration, unilateral ADIZ pronouncements were essentially uncontested by States. For ADIZ practice prior to China's see Ruwantissa Abeyratne, *In search of theoretical justification for air defence identification zones*, 5 J TRANSP SEC 87 (2012). For protests against, and challenges to, China's East China Sea ADIZ see Shinzo Abe: China new air defence zone move 'dangerous', BBC NEWS, (25 Nov. 2013), available at <http://www.bbc.co.uk/news/world-asia-25050493> (last accessed 25 Apr. 2014); Naoya Yoshino, *Two US bombers enter China's new air defence zone*, Nikkei Asian Review, (27 Nov. 2013), available at <http://asia.nikkei.com/Politics-Economy/International-Relations/Two-US-bombers-enter-Chinas-new-air-defense-zone> (last accessed 25 Apr. 2014).

⁸ South Korea's Air Defence Identification Zone was established in 1951 and remained unchanged until 15 Dec. 2013. South Korea's expanded ADIZ includes airspace over the Ieodo reef. *S. Korea expands air zone in East China Sea in response to China's move*, Nikkei Asian Review, (8 Dec. 2013), available at <http://asia.nikkei.com/Politics-Economy/International-Relations/S-Korea-expands-air-zone-in-East-China-Sea-in-response-to-Chinas-move>. It should also be noted that Japan's pre-existing ADIZ included the disputed Senkaku/Diaoyu Islands. Japan did not object to the expanded South Korean ADIZ. See *Japan OK with S. Korean ADIZ*, The Japan Times, (10 Dec. 2013) available at <http://the-japan-news.com/news/article/0000858281> (last accessed 29 Dec. 2013).

It is within this context of escalating tensions over disputed territories in the East China Sea, brought about by conflicting claims to exercise limited sovereignty in airspace over these disputed territories, that this article will explore the emergence of ADIZs as a legal and security concept and highlight contested State practice in relation to the regulation of airspace outside of a State's territorial airspace. It will note that while ADIZs may not violate international law,⁹ ADIZs have no basis in existing international conventions or treaties and therefore fall outside of existing international regulatory frameworks, which govern aircraft operating in international airspace. It will also point out that tensions over the extent to which States can impose reporting obligations on foreign aircraft outside of territorial airspace reflect contested interpretations of international maritime law, and in particular the 1982 UN Convention on the Law of the Seas, which permits States to claim exclusive economic zones that extend far beyond a State's territorial waters.¹⁰ However, before discussing these observations in greater detail, it is first necessary to introduce ADIZs as a legal and security practice.

2 AIR DEFENCE IDENTIFICATION ZONES: SECURING THE SKIES OR CREEPING SOVEREIGNTY?

ADIZs first emerged during the early years of the Cold War as a security measure with the specific aim of countering a feared strategic air attack.¹¹ Although Cold War advancements in intercontinental ballistic missile technology quickly made the threat of strategic air attack obsolete, this rationale has been articulated as recently as November 2013 by a Japanese defence official who noted that Japan's ADIZ, which extends hundreds of miles beyond Japan's territorial airspace, was necessitated by the threat posed by aircraft travelling at high speed and the inability to defend territorial airspace if an aircraft's hostile intent was only determined upon the aircraft's penetration of territorial airspace.¹² In addition, the 11 September 2001 attacks on Washington D.C. and New York provided ADIZs with a new purpose to guard against hijacked civilian aircraft bound for US territorial airspace.¹³

⁹ See Peter A. Dutton, *Caelum Liberum: Air Defense Identification Zones Outside of Sovereign Airspace*, 103 AJIL 691 (2009) [Hereinafter Dutton].

¹⁰ Exclusive economic zones (EEZs) were established through the 1982 UN Convention on the Law of the Sea (UNCLOS). EEZs afford coastal nations the right to claim an EEZ extending up to 200 nautical miles from the coast. Article 58 of the Convention, however, provides for high seas freedom of navigation and over flight within EEZs. Malcolm N. Shaw, *International Law*, 582 (6th ed. 2008). See further (text to) notes 21 and 22.

¹¹ Dutton *supra* note 9 at 691.

¹² *What is an Air Defense Identification Zone?*, The Japan News, (27 Nov. 2013), available at <http://the-japan-news.com/news/article/0000826330> (last accessed 25 Apr. 2014).

¹³ Dutton *supra* n. 9 at 691.

Nevertheless, despite their shifting purpose, from guarding against strategic air attack to detecting hijacked civilian aircraft, the rationales articulated for imposing reporting restrictions upon aircraft hundreds of miles beyond a State's territorial airspace are for the most part embedded in security concerns. However, current debates on ADIZs, particularly in East Asia, have introduced additional non-security justifications for the unilateral imposition of reporting obligations upon aircraft, such as the administrative need to control air traffic in highly congested skies.

The patchwork of rationales for ADIZs, security or administrative, is a product of diverse reporting regimes and understandings of ADIZs on the part of States. In the absence of an international legal regime governing these unilateral declarations, ADIZs have assumed diverse forms. Furthermore, in East Asia where Japan, South Korea and Taiwan all maintain longstanding ADIZs, ADIZs have been part of the security architecture for decades. Yet, at the same time, Northeast Asia's ADIZ regimes, prior to China's declaration of an East China Sea ADIZ, were strikingly similar given that they were drawn by the US military in the aftermath of the Second World War and later adopted by South Korea and Japan without significant change. Therefore, there was also little territorial overlap. For example, Japan's ADIZ did not include the disputed Takeshima/Dokdo Islands or the Kuril Islands.¹⁴

To be sure, it is not just the geographic scope included within ADIZs, which often extend for more than 300 miles beyond a State's territorial airspace, that is contested. States that establish ADIZs have widely divergent views on their scope and the obligations they may impose upon foreign aircraft transiting demarcated airspace. This absence of uniformity in ADIZ scope or obligation is a result of the differing rationales that underlie their creation, security or administrative, which were mentioned earlier. For example, those States that see ADIZs primarily as a security instrument do not aim to regulate air traffic beyond their airspace. In this respect, the US adopts a narrow approach to ADIZ obligations by imposing reporting obligations only upon those aircraft intending to enter US territorial airspace.¹⁵ On the other hand, China takes a wider approach to reporting obligations through a demand that all aircraft penetrating China's ADIZ report their flight plans and positions to national authorities.

¹⁴ Jun Osawa, *China's ADIZ over the East China Sea: A 'Great Wall in the Sky'?*, BROOKINGS INSTITUTION, (17 Dec. 2013), available at <http://www.brookings.edu/research/opinions/2013/12/17-china-air-defense-identification-zone-osawa#> (last accessed 25 Apr. 2014).

¹⁵ Japan also maintains a similar ADIZ reporting regime that imposes a reporting obligation only on those aircraft intending to enter Japan's territorial airspace, but not upon those aircraft only transiting Japan's ADIZ.

Given the absence of an international legal framework to establish international norms and guidelines for ADIZs, widely divergent obligations are now imposed upon aircraft transiting demarcated airspace. This article cautions that variance in the nature of obligations imposed upon aircraft are grounded in two divergent approaches to ADIZs. States which view ADIZs as a self-defence mechanism, designed to detect an airborne attack on sovereign territory, are reluctant to impose stringent reporting regimes upon aircraft not intending to enter territorial airspace. Meanwhile, States which see ADIZs as an extension of territorial airspace, take a broader view of reporting obligations as they wish to demonstrate their administrative control over aircraft within ADIZs and to use ADIZs to advance claims to sovereignty over airspace and subjacent maritime territories.

Given the above, it is therefore not surprising that ADIZs have emerged as a focal point of tension for maritime territorial disputes in East Asia.¹⁶ Indeed, while ADIZs first emerged in North America, with the United States and Canada being the first two States to establish ADIZs, the US extended its practice of creating ADIZs to the Pacific by establishing ADIZs for both South Korea and Japan in 1951.¹⁷ And as recently as 2010, Japan acted to unilaterally expand the airspace contained within its ADIZ.¹⁸

However, before exploring ADIZs in the context of State practice, it is first necessary to revisit the question of what, if any, international legal basis exists for a State to make claims to exercise limited sovereignty outside of territorial airspace. Then, this article will turn to how States define ADIZs and what obligations States seek to impose upon foreign aircraft entering these designated zones. It will then conclude by emphasizing the risks posed by ADIZs, in particular in relation to disputed territories, and their continued use despite the fact there remains no legal basis in international conventions or treaties for such zones, and the absence of consistency in terms of State practice in relation to declared ADIZs.

¹⁶ It is also important to note that the historic genealogy of ADIZs, as legal and security concepts, is deeply intertwined with the turbulent years that followed the end of the Second World War and onset of the Cold War in the region.

¹⁷ In 1969 Japan officially declared its ADIZ; however, an ADIZ established by the US led occupation over Japanese territory was established earlier in 1951. Mizuho Aoki, *ADIZs are Common but China's is Worrisome*, Japan Times, (25 Nov. 2013), available at <http://www.japantimes.co.jp/news/2013/11/25/reference/adizs-common-but-chinas-is-worrisome/> (last accessed 25 Apr. 2014).

¹⁸ In 2010 Japan expanded its ADIZ to include the entire island of Yonagunijima, part of which was under Taiwan's ADIZ. This discrepancy apparently resulted from Japan's adoption of the pre-existing US' ADIZ when the territory of Okinawa was returned to Japan. However, Japan's expanded ADIZ resulted in overlapping ADIZs between Japan and Taiwan. See Shih Hsiu-chuan, *Japan extends ADIZ into Taiwan space*, Taipei Times, (26 Jun. 2010), available at <http://www.taipeitimes.com/News/front/archives/2010/06/26/2003476438> (last accessed 25 Apr. 2014).

3 AIR DEFENCE IDENTIFICATION ZONES AND INTERNATIONAL LAW

Air Defence Identification Zones are designated areas of non-territorial airspace where States impose reporting obligations on civil and military aircraft. In the absence of an international framework to regulate ADIZs, they take the form of unilateral declarations by States to impose these obligations in non-territorial airspace. As such ADIZs have been argued by Cuadra to violate core principles of public international air law, the freedom of air navigation in international airspace, while Dutton argues the simple request to report, implied by an ADIZ, is not a violation of law.¹⁹ The core dispute on this matter gravitates around the question as to whether or not the reporting regime established through an ADIZ constitutes a restriction for air navigation in non-territorial airspace.²⁰ If this is the case, taken together, major international conventions that set out the legal regime governing airspace over international waters, the 1944 Convention on International Civil Aviation (the Chicago Convention), the 1958 Convention on the High Seas, the 1958 Convention on Territorial Sea and Contiguous Zone, and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) all reaffirm, directly or indirectly, the principle that States are prohibited from unilateral attempts to restrict air traffic in airspace beyond their territorial seas.²¹ Even in the context of disputed sovereign rights that can be derived from Exclusive Economic Zones (EEZs) that were established in the UNCLOS, it is evident airspace above an EEZ remains airspace beyond the territorial seas of States.²²

¹⁹ For a skeptical view on ADIZ's compliance with international law see Elizabeth Cuadra, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, 18 VA. J. INT'L L. 485 (1977) [Hereinafter Cuadra]. For ADIZs as compliant with international law see Julian Ku, *Why the U.S. is Not Invoking International Law to Oppose China's ADIZ*, *Opinio Juris*, (9 Dec. 2013), available at <http://opiniojuris.org/2013/12/08/china-correct-adiz-violable-international-law-doesnt-make-right> (last accessed 25 Apr. 2014) and Dutton, *supra* n. 9.

²⁰ The 1919 Paris Convention for the Regulation of Aerial Navigation was the first to recognize the principle of freedom of the skies, *caelum liberum*, above the high seas.

²¹ Cuadra, *supra* n. 19 at 488–489. For example, Art. 87 UNCLOS specifies in para. 1 (b) 'Freedom of the high seas...comprises, *inter alia*...(b) freedom of overflight.' Art. 58 confirms that this freedom applies fully to the EEZ. As to the Chicago Convention, see below.

²² UNCLOS permits States to claim Exclusive Economic Zones beyond their territorial sea; however, this does not include within it the ability to restrict movement within EEZs or in airspace over an EEZ. Nevertheless, soon after the 1982 Convention some States sought to restrict access on the part of military vessels to their declared EEZs; however, these efforts were rejected by the Legal Committee of the International Civil Aviation Organization as a flagrant attempt to restrict access to airspace over the high seas. See Dutton 2009. In particular, in recent years, China has aggressively pursued the claim that it can exercise the right to restrict access to its EEZs on the part of US military aircraft and vessels. See Ji Guoxing, *The Legality of the Impeccable Incident*, 5 China Security, (2009), (Hereinafter Ji Guoxing).

Public international air law, the *lex specialis*, from which an international air traffic regulatory framework is derived, neither provides a legal basis for ADIZs nor prohibits a State from declaring such a zone, which by definition extends beyond a State's claimed territorial waters. The Chicago Convention, which provides a regulatory framework for international air traffic, recognizes the customary international law principle of *aer clausum*, which grants all States, whether contracting parties to the Convention or not, exclusive sovereignty over airspace above their territory.²³ The Chicago Convention defines a State's territory as, 'the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State'.²⁴ As such, exclusivity of airspace is restricted to a State's sovereign territory or territorial waters.

The 1958 Convention on the High Seas provides further support for the general prohibition against unilateral restrictions in airspace over the high seas. Indeed, that Convention prohibits contracting parties from making claims of sovereignty over any part of the high seas and explicitly makes reference to the freedom to make use of the airspace above the high seas as a principle of customary international law.²⁵

In sum, ADIZs may violate what Hailbronner identifies as the two core principles of public international air law:

- (1) The State's full and absolute sovereignty over the airspace above its territory and territorial waters.
- (2) The airspace above the high seas is open to air traffic from all nations and not subject to the sovereignty of any State.²⁶

The declaration of maritime EEZs on the part of States, does nothing to restrict the second principle of public international air law, freedom of airspace above the

²³ See the Convention on International Civil Aviation, 7 Dec. 1944 [hereinafter the Chicago Convention], Art. 1, which states '[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.' Full text of the Chicago Convention is available at http://www.icao.int/publications/Documents/7300_cons.pdf (last accessed 25 Apr. 2014).

²⁴ The Chicago Convention, Art. 2.

²⁵ Convention on the High Seas, Art. 2, 29 Apr. 1958. Article 2 reads:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these Articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

1. Freedom of navigation;
2. Freedom of fishing;
3. Freedom to lay submarine cables and pipelines;
4. Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

²⁶ Kay Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, 77 AJIL 490, (1983).

high seas, as EEZs grant a State the exclusive right to exercise certain rights such as the exploitation of natural resources, but do not allow States to impede access to the waters or airspace within an EEZ.²⁷

However, on the other hand, it is important to understand that airspace over the high seas is not free from regulation or reporting requirements for civilian aircraft. As Cuadra notes, the high seas, '[f]ar from being an unlimited expanse that one can traverse at will, subject only to the occasional requirement of a subjacent State, [...] is a maze of highly regulated airways, air navigational aids, and "rules of the air."' ²⁸ Indeed, the International Civil Aviation Organization (ICAO), established through the Chicago Convention, was created in order to implement the 'rules of the air' for civilian aircraft.²⁹ In order to achieve this, ICAO divided the globe into Flight Information Regions (FIRs), in which flight information and weather alerting services are provided. Aircraft are also required to file flight plans for navigational safety in international airspace.³⁰ Thus, it is important to emphasize that beyond territorial airspace, the globe is already divided into FIRs, and US military aircraft on routine flights follow ICAO reporting procedures and make use of FIR services.³¹

To provide for uniform air navigation rules across the globe, Article 12 of the Chicago Convention ('Rules of the air') provides:

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this convention. Over the high seas, the rules in force shall be those established under this Convention.

Thus, States apply and enforce national air navigation rules in their national air space and require 'their' aircraft to abide by the national rules of other States when

²⁷ Nevertheless, there remains an important distinction, as the waters within EEZs are no longer considered 'high seas.' Instead, those States that argue that EEZs do not extend the territorial jurisdiction of coastal States to 200 nautical miles, argue that EEZs remain international waters, in which coastal States can exercise certain rights. However, ten States, including China, claim an authority to restrict military access to their claimed EEZs. These States include: Bangladesh, Brazil, Burma, China, India, Iran, Malaysia, North Korea, Pakistan and Uruguay. See Dutton, 7.

²⁸ Cuadra *supra* n. 19 at 490.

²⁹ The Chicago Convention only applies to civil aircraft, not to 'state aircraft', i.e., aircraft used in military, customs and police services, see Art. 3 (a) and (b). In practice, the latter aircraft abide by the Chicago rules and coordinate their flights with the civilian aviation authorities.

³⁰ *Ibid.*

³¹ Commander's Handbook on the Law of Naval Operations, United States Navy, 2007, at 13 (hereinafter COMMANDER'S HANDBOOK).

flying in foreign national airspace. The main rules, 'standards and recommended practices' or SARPS, can be found in two Annexes to the Convention, Annex 2 and 11.³²

The rules referred to in the last sentence of Article 12 are the 'standards', on flight plans, right of way, minimum height, position reports, etc., contained in Annex 2 ('Rules of the air'); they are the law and apply without exception to all aircraft operating in airspace above the high seas.

However, Annex 2 is silent on the question of ADIZs, and therefore States are not under an obligation to report such declarations to the ICAO. Thus, States issue proclamations declaring the existence of such zones and reporting requirements imposed within them through their relevant national defence or aeronautical authorities, which accounts for widely divergent State practices that will be highlighted in the next section.³³ In short, the free airspace above the high seas is subject to a set of international traffic management rules developed within ICAO to be scrupulously adhered to by the Member States. However, in recent decades this multilateral arrangement is increasingly subject to encroachment on the part of unilateral pronouncements on the part of States.

Of course, an additional point of contestation is the extent to which States can make use of claims to the exercise of sovereign rights in airspace over EEZs, which as a result of UNCLOS are no longer designated as high seas. States, such as China, insist that seas within EEZs are not to be considered high seas, but rather China argues that States must abide by Chinese laws when in China's EEZ.³⁴ The United States, on the other hand does not recognize the right of States to restrict navigation or overflight for warships or military aircraft beyond its territorial sea.³⁵ However, in order to elucidate this point of contestation, we must first look at the ADIZ regimes as a security practice.

4 AIR DEFENCE IDENTIFICATION ZONES AS A SECURITY PRACTICE

The previous section both defined ADIZs and noted key gaps in their regulation. Although international law prohibits States from restricting airspace over the high seas, ADIZ regimes include compliance measures and the implicit threat of the use

³² States have the right to adopt rules for the use of their airspace which differ from the SARPS, as long as they report these differences to ICAO, see Art. 12 'to the greatest possible extent', and (on the adoption of resp. deviation from SARPS) Arts 37 and 38 Chicago Convention.

³³ Cuadra *supra* n. 19 at 491.

³⁴ Ji Guoxing, *supra* n. 22 at 18.

³⁵ Commander's Handbook, *supra* n. 31 at 10.

of force in the event of non-compliance with a State's reporting restrictions. In the absence of regulatory oversight over ADIZs through the ICAO, and growing disputes over the extent to which States can restrict access to non-territorial airspace there is an urgent need to provide clarity on this question of public international air law. In order to help shed light on this question this article will now turn to ADIZ practice on the part of the US and China.

As mentioned at the outset, the initial justification for ADIZs was not a legal one, but rather a pragmatic one grounded in national security. It is because aircraft travel at high speeds that States are unable to wait until an aircraft has penetrated its territorial airspace in order to determine whether the aircraft in question has hostile intent. Under such conditions States would be effectively unable to exercise self-defence.³⁶ Therefore, although ADIZs lack any treaty or customary basis in international law, they were justified on the grounds of military necessity as an early warning system against a feared strategic air attack and were invoked by about a dozen States during the course of the Cold War.³⁷ ADIZs, presented as a security necessity to defend sovereign territory from armed attack, facilitated the unilateral placement of restrictions on airspace over the high seas on the part of a number of States.³⁸ The United States, Canada and France were among the first States to declare ADIZs and were soon followed by Iceland, Japan, Italy, Malaysia, the Philippines and South Korea.³⁹ Furthermore, during the Cold War both the Soviet Union and China maintained identification zones that were tantamount to ADIZs.⁴⁰

In short, claims advanced by States to limited sovereignty over airspace beyond a State's territorial waters were justified solely on national security grounds,⁴¹ and this justification was revived in the wake of the 11 September 2001 attacks against the United States as concern shifted from strategic air attacks to potential attacks mounted using civilian aircraft.⁴² Nevertheless, State practices and norms applied to aircraft varied significantly across national jurisdictions. In order to elucidate this diversity in State practice in relation to ADIZs, this article will now turn to ADIZs declared by the US and China.

³⁶ This rationale was recently articulated by a Japanese Air Self Defence Force official who stated, 'As most aircraft fly at extremely high speeds, it would be too late if nations began distinguishing whether aircraft belong to hostile nations after they have entered territorial airspace.' Quoted in *supra* n. 12.

³⁷ Cuadra *supra* n. 19.

³⁸ As mentioned, Canada, South Korea, Japan and Taiwan are among States with declared ADIZs.

³⁹ Cuadra, *supra* n. 19 at 495.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Dutton, *supra* n. 9.

5 AIR DEFENCE IDENTIFICATION ZONES AND REPORTING REGIMES

5.1 THE UNITED STATES' AIR DEFENCE IDENTIFICATION ZONES

In 1950, the United States became the first State to declare an Air Defence Identification Zone. In order to compel civil aircraft to comply with US' ADIZs, the US Congress amended the Civil Aeronautics Act of 1938, so as to allow for the promulgation of security provisions directed at civilian aircraft upon the determination by the President that such action was necessitated by national security.⁴³ Congress' amendment of the 1938 Civil Aeronautics Act was then followed by President Truman's Executive Order *Directing the Secretary of Commerce to Exercise Security Control Over Aircraft In Flight* (No. 10197), which stated:

By virtue of and pursuant to the authority vested in me by section 1201 of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended by the act of September 9, 1950 (Public Law 778, 81st Congress), and having determined that this action is required in the interest of national security, the Secretary of Commerce is hereby directed, for such time as this order remains in effect, to exercise by rule, regulation, or order, in such manner as he may deem necessary to meet the requirements of national security, all the powers, duties, and responsibilities granted to him in section 102 of the said act, as amended.⁴⁴

Seven days after President Truman's Executive Order No. 10197, the Secretary of Commerce adopted regulations designating airspace as Air Defence Identification Zones.⁴⁵ The US established four ADIZs: the Contiguous US' ADIZ, the Alaska ADIZ, the Guam ADIZ, and the Hawaii ADIZ. Importantly, the US' ADIZs' reporting obligations applied only to those aircraft en route to US sovereign territory.

The US Code of Federal Regulations defines Air Defence Identification Zones as 'an area of airspace over land or water in which the ready identification, location, and control of civil aircraft is required in the interest of national security'.⁴⁶

These are distinct from *Defence Areas*, which are restricted to US territorial airspace and are defined as, 'any airspace of the contiguous United States that is not an ADIZ in which the control of aircraft is required for reasons of national security'.⁴⁷

⁴³ The Civil Aeronautics Act of 1938 (52 Stat. 973) § 1201 as amended by the Act of 9 Sep. 1950, Public Law 778, 81st Congress.

⁴⁴ Exec. Order No. 10,197, (1950).

⁴⁵ Fed. Reg. 9319, 1950.

⁴⁶ 14 C. F. R. 14, § 99.

⁴⁷ 14 C. F. R. 14, § 99.

Although the US imposes upon aircraft en route to the US the obligation to report locations and flight plans prior to penetration of an ADIZ, the US does not impose reporting obligations on aircraft penetrating a US' ADIZ, but not intending to enter US territorial airspace. The US will also not comply with such reporting requirements imposed by other nations. The US Navy's *Commander's Handbook on the Law of Naval Operations* notes:

The United States does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter national airspace. Accordingly U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with ADIZ procedures established by other nations, unless the United States has specifically agreed to do so.⁴⁸

Thus, aircraft in transit through an ADIZ, not en route to the US, are excluded from this regime. As a general principle, the US does not recognize the right of States to apply an ADIZ to aircraft not intending to enter their sovereign territory.⁴⁹

In sum, US' ADIZs can be seen as an artifact of the Cold War, which were first created in 1950 to defend against a feared Soviet strategic air attack upon US sovereign territory. They were maintained throughout the Cold War and gained renewed importance in the aftermath of the 11 September 2001 attacks on New York and Washington DC. The US' ADIZs are primarily a national security mechanism to provide an early warning against threats to US sovereign territory and therefore impose narrow reporting obligations only upon aircraft bound for US sovereign territory. It does not attempt to fulfil an administrative function nor support claims to sovereignty over disputed territories. As will be noted in the following section, this position departs significantly from that of China in relation to its 23 November 2013 promulgation of an East China Sea ADIZ.⁵⁰

5.2 CHINA'S EAST CHINA SEA AIR DEFENCE IDENTIFICATION ZONE

When China declared its ADIZ over the East China Sea, China's official *Xinhua* news agency described the ADIZ as follows:

⁴⁸ Commander's Handbook, *supra* n. 31 at 13.

⁴⁹ *Ibid.*

⁵⁰ It is of interest to note that prior to China's own declaration of an ADIZ, the US' ADIZ was decried as hypocritical in the sense that the US objected to China's attempt to restrict military air traffic over its EEZs, yet the US imposed restrictions on airspace over the high seas that extended far beyond US territorial waters in its ADIZs. See Ji Guoxing, *supra* n. 22.

[ADIZ] is a zone that can extend in some cases up to 300 miles beyond the territorial sea. It's established by some countries off their coasts for security reasons. When entering the zone, all aircraft are required to identify themselves, report flight plans, and inform ground control of their exact position.⁵¹

Xinhua's description of China's ADIZ has three key features. First, the territorial limitation of 300 miles beyond a State's territorial sea; second, establishment on grounds of national security, and third the requirement all aircraft that enter the ADIZ identify themselves, report flight plans and inform ground control of their positions. Here it is in respect to the third feature, the requirement that all aircraft comply with an obligation to identify themselves, not just aircraft intending to enter China's sovereign airspace, where China's ADIZ differ from that of the US

Although China had not previously declared an ADIZ, it had established de facto restrictions on aircraft operating near territorial waters. In 1958 China first declared seaward claims to control over airspace, and over the course of the following decades considered formally declaring an ADIZ that would extend far beyond China's territorial waters. Most recently, China publicly floated the idea of establishing an ADIZ for the East China Sea and the Taiwan Straights in 2008, immediately prior to the Beijing Olympics on the grounds that it was necessary to protect the Olympics from an aerial attack.⁵² However, it was only on 23 November 2013 that China declared its first ADIZ in the East China Sea.

It is important to emphasize that the underlying motive behind Beijing's 23 November ADIZ proclamation departs from the original intent of Cold War ADIZs, early warning against a strategic air attack on sovereign territory. Indeed, it has been pointed out that for China, 'reducing the risk of surprise attack cannot have been part of the equation'.⁵³ Despite the publicly stated rationale that the East China Sea ADIZ was necessitated by the threat of an air attack against China's sovereign territory,⁵⁴ the geographic zone over which the ADIZ has been

⁵¹ Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone, *Xinhua*, (23 Nov. 2013), available at http://news.xinhuanet.com/english/china/2013-11/23/c_132911635.htm (last accessed 25 Apr. 2014).

⁵² Dutton, *supra* n. 9.

⁵³ David A. Welch, *What's an ADIZ?*, *Foreign Affairs*, (9 Dec. 2013). Nevertheless, on 3 Dec. 2013 China's Ministry of Defence issued a statement emphasizing an air defense necessity and need to regulate air traffic, alongside a territorial claim to the Senkaku/Diaoyu Islands. China's Foreign Ministry also issued a statement on the same day; however, this statement emphasized the ADIZ was established due to high flight congestion in the East China Sea and therefore was necessitated to ensure the safety of air traffic. See *Defense Ministry spokesman on China's air defense identification zone*, *XINHUA*, (3 Dec. 2013), available at http://news.xinhuanet.com/english/china/2013-12/03/c_132938762.htm (last accessed 25 Apr. 2014); *China's ADIZ to improve identification: FM spokesman*, *Xinhua*, (3 Dec. 2013), available at http://news.xinhuanet.com/english/china/2013-12/03/c_132938467.htm (last accessed 25 Apr. 2014).

⁵⁴ For example, following the declaration of China's ADIZ, China's Defence Ministry spokesman Yang Yujun stated that, 'an air defense identification zone is established by a maritime nation to guard against potential air threats. This airspace is demarcated outside the territorial airspace and allows the country to set aside time for early warning and helps defend the country's airspace.' See *Military experts*

declared, namely the East China Sea, and not for example the Taiwan Straits, adds further support to the observation that the East China Sea ADIZ's primary function is to support China's claims over disputed territory. In fact, Foreign Ministry spokesperson, Qin Gang, explicitly linked the ADIZ's declaration to China's territorial claim over the Senkaku/Daioyu Islands in a press conference on 25 November 2013 when stating:

I want to highlight that the Diaoyu Island and its affiliated islands are China's inherent territory. China is firm in defending its territorial sovereignty over the Diaoyu islands. The current tensions over the Diaoyu islands are completely caused by Japan's erroneous actions.⁵⁵

Therefore, the wider reporting obligations imposed by China through its ADIZ underline the fact that China's ADIZ was not declared out of military necessity, to defend sovereign territory against a strategic air attack, but rather it was established so as to demonstrate China's administrative control over disputed territories, which China considers territorial airspace.

While this article does not make claims as to sovereignty in relation to the Senkaku/Daioyu or Ieodo/Suyan disputes, other than to acknowledge these territories are contested, the promulgation of ADIZs so as to demonstrate administrative control over contested territories through the imposition of comprehensive reporting obligations on all air traffic significantly transform the nature of ADIZs, and claims as to their legality. Of course, the risk that States would make use of ADIZs to advance claims of sovereignty is not new. As early as 1977, Cuadra articulated these fears. Cuadra observed:

The seaward expansion of one aspect of sovereignty, although it may itself have no legal validity, potentially may serve as a precedent for seaward extensions of other aspects of sovereignty. Thus, the question naturally arises whether, when linked with resource recovery zones for fisheries and the seabed, these zones in the airspace may harden into claims of full territorial sovereignty rather than the limited control they now represent.⁵⁶

Cuadra's insight into the risks posed by ADIZs through claims to creeping sovereignty appears to be affirmed in the context of contemporary developments

explain China's air defense identification zone, Xinhua, (23 Nov. 2013) available at http://news.xinhuanet.com/english/china/2013-11/23/c_132912230.htm (last accessed 25 Apr. 2014).

⁵⁵ *Foreign Ministry Spokesperson Qin Gang's Regular Press Conference on November 25, 2013*, Embassy of the People's Republic of China in the United States of America, (26 Nov. 2013), available at <http://www.china-embassy.org/eng/fyrth/t1102346.htm> (last accessed 25 Apr. 2014) (hereinafter *Qin Gang's Regular Press Conference*).

⁵⁶ Cuadra, *supra* n. 19 at 486.

in the airspace above the East China Sea, where China, Japan and South Korea now maintain conflicting ADIZs.⁵⁷

Indeed, the East China Sea ADIZ can also be seen as consistent with longstanding attempts, on the part of China, to claim territorial rights beyond territorial waters. China's attempt to restrict both maritime, and now air traffic, within its EEZ through recourse to law has previously been described by Keck as a form of 'lawfare'. Lawfare, a term borrowed by Keck from US Air Force General Charles Dunlap, was defined as 'the use of law as a weapon of war'. Interestingly, the term 'lawfare' was also used by China's Peoples' Liberation Army in reference to 'a nation's use of legalized institutions to achieve strategic ends'.⁵⁸ China's appeals to international law, through its observation that the ADIZ does not violate the UN Charter, and domestic law, through its referencing of the *Law of the People's Republic of China on National Defence*, *Law of the People's Republic of China on Civil Aviation* and the *Basic Rules on Flight of the People's Republic of China*, highlight how China seeks to present its ADIZ as a legal act.⁵⁹ Cuadra's concern that States will use ADIZs as a means through which they can extend claims of full sovereignty over a given territory stems from the observation that the exercise of administration over a given territory can serve as a basis for the recognition of full sovereignty over that territory if carried out over a period of time and if other States accept the administering State's administrative regimes. Here China's meticulous reporting of State compliance with its ADIZ can be seen as evidence that States have acquiesced to China's administration of airspace above disputed territories.

On the other hand, prior to the East China Sea ADIZ, there seems to be almost no precedent for a State using an ADIZ to stake out territorial claims to territory. The US' ADIZs, which in some cases extend 400 miles beyond US territorial waters, does not aim to regulate air traffic within the ADIZ, but rather functions solely as an extra-territorial defensive cordon. Yet, this is where the US and China's ADIZ regimes differ. Unlike the US, China demands all aircraft identify themselves and provide flight plans in the event of penetration of its East China Sea ADIZ. China also claims, through its ADIZ, to provide an administrative service to ensure the safety of civilian aircraft transiting highly congested airspace over international waters. In sum, China's ADIZ has been justified in terms of all both rationales for ADIZs noted earlier, security and administrative.

⁵⁷ Although Japan and South Korea impose reporting obligations only upon those aircraft intending to enter territorial airspace and are thus consistent with US' ADIZs.

⁵⁸ Zachary Keck, *With Air Defense Zone, China is Waging Lawfare*, *The Diplomat*, (30 Nov. 2013), available at <http://thediplomat.com/2013/11/with-air-defense-zone-china-is-waging-lawfare/> (last accessed 25 Apr. 2014).

⁵⁹ *Qin Gang's Regular Press Conference*, *supra* n. 56.

6 CONCLUSIONS

This article notes that although ADIZs lack any basis in international treaties or conventions, States have established ADIZs in an attempt to impose restrictions on aircraft entering demarcated airspace over international waters. These ADIZs, which can extend hundreds of miles beyond a State's territorial seas, previously constituted a security measure imposed in demarcated airspace outside of a State's territorial airspace to defend against strategic air attack. Thus, the principal justification articulated by States for the imposition of reporting requirements beyond their territorial seas was that of national security. A second justification, which was more recently articulated, was the necessity to administer increasingly congested skies over international waters. In relation to administration of airspace, something the US does not do within its ADIZ, there is an increased risk States may perceive ADIZs as a way to demonstrate administrative control over a particular territory. When this issue is linked with contested State interpretations of UNCLOS and EEZs, it is evident that ADIZs risk increasingly evolving from a defensive security measure into a means to advance claims of sovereignty over contested territories.